

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of )  
 )  
BellSouth Telecommunications, Inc. )  
 )  
Request for Declaratory Ruling That State )  
Commissions May Not Regulate Broadband )  
Internet Access Services by Requiring BellSouth )  
To Provide Wholesale or Retail Broadband )  
Services to CLEC UNE Voice Customers )

WC Docket No 03-251

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**REPLY COMMENTS OF  
BELLSOUTH TELECOMMUNICATIONS, INC.**

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February 20, 2004

No. of Copies filed 014  
Listed Code

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**INTRODUCTION AND SUMMARY**

It is now settled federal law that ILECs may not be dragooned into providing broadband service to CLEC UNE voice customers. Most importantly, in the *Triennial Review Order*,<sup>1</sup> the Commission rejected CompTel's request that the Commission establish a low-frequency portion of the loop UNE as a way of requiring BellSouth to provide DSL service to CLEC UNE voice customers. The Commission expressly concluded that, contrary to CompTel's position, forcing BellSouth to offer broadband service is not pro-competitive. Rather, competition and consumers benefit if CLECs have incentives either to develop competing broadband service themselves or to "partner[]" with another competitive provider "to take full advantage of an unbundled loop's capabilities." 18 FCC Rcd at 17141, ¶ 270

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<sup>1</sup> Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*"), *petitions for mandamus and review pending, United States Telecom Ass'n v. FCC*, Nos. 00-1012, 00-1015, 03-1310 *et al.* (D.C. Cir. argued Jan. 28, 2004)

BellSouth cannot put this point any better than a federal court recently did in rejecting a class-action complaint based on the same BellSouth policy “[T]he FCC, in its *Triennial Review Order*, has already examined possible competitive benefits from requiring ILECs to provide their DSL service to CLEC customers, and it has determined not only that such a regulatory requirement would bring no benefit, but also that it would discourage investment and innovation and thus harm consumers.”<sup>2</sup>

The *Triennial Review Order* likewise establishes that states may not “thwart[]” or “frustrate[]” the Commission’s judgment of national policy by adopting contrary requirements 18 FCC Rcd at 17099-100, ¶ 192. State attempts to do so “substantially prevent” implementation of the federal scheme, and thus are preempted under 47 U S C § 251(d)(3) *Id* at 17100-01, ¶¶ 194-196. If states fail to “alter” such unlawful decisions themselves, the Commission will resolve the matter through declaratory ruling proceedings such as this one *Id* at 17101, ¶ 195.

The CLEC comments in this proceeding are nothing but an attempt to relitigate these settled issues. The CLECs assert that the Commission has not resolved whether ILECs may be forced to offer broadband service to CLEC UNE customers. They then claim that, even if the Commission had done so, each state is free to pursue its own broadband policy because the Commission’s regulatory requirements are but a “floor,” and states are free to heap additional regulatory burdens on broadband services as they please. Finally, the CLECs argue that the Commission’s policy judgments are misguided.

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<sup>2</sup> *Levine v BellSouth Corp*, No. 03-20274-CIV, slip op at 21 (S.D. Fla. Jan. 27, 2004) (attached as Exh. 1).

and that encouraging CLECs to engage in facilities-based broadband competition is actually not the right policy

The CLECs are fighting yesterday's battles. The Commission has decided each of these issues. CLECs were free to challenge such decisions in court or on reconsideration. They may not use this declaratory ruling proceeding, however, as a forum for collateral attack on the Commission's prior determinations. In any event, CLEC claims that they should not be encouraged to invest in competing broadband facilities are no stronger today than they were when the Commission rejected them before. The Commission should thus declare that its prior rulings mean what they say and that state commissions are preempted from requiring ILECs to offer broadband services to CLEC UNE customers

In any event, even if the legal issues here were open at the Commission, as the CLECs argue, states would *still* be preempted from telling BellSouth to whom it must provide its interstate services, and under what terms and conditions. The state commissions try to avoid the clear law on this point by arguing that they are not regulating BellSouth's broadband services. Saying it doesn't make it so, however. Under any standard, ordering BellSouth to provide service to certain customers and under certain terms and conditions is regulating BellSouth's interstate service, regardless of the state commissions' motivations.

For their part, CLEC commenters largely do not dispute the obvious fact that states are regulating BellSouth's broadband services, but contend instead that states can regulate these services because they are allegedly jurisdictionally mixed. These

commenters are wrong. In the *GTE Tariff Order*,<sup>3</sup> the Commission expressly found that, because DSL service for Internet access is subject to this Commission's exclusive jurisdiction under the 10% rule applicable to special access services, there was no need to determine whether states are also preempted under the same line of cases cited by commenters. Those cases were irrelevant because the Commission, under the 10% rule, had *already* determined that the service was subject to this Commission's exclusive authority.

Indeed, the Commission's determination that this service should be federally tariffed *necessarily* ousts the states' jurisdiction. Such a tariff exclusively controls the rates, terms, and conditions of service. As AT&T itself told the Supreme Court, even if a federal tariff were silent on an issue, creating a "gap," that gap must be "'filled in' *uniformly as a matter of federal law*," not through "state" law.<sup>4</sup> There is thus no substance to CLEC arguments that it is lawful for the states to establish 50 different rules for a single interstate, and federally tariffed, service.

Additionally, although the Commission need not reach the issue, commenters are wrong in arguing that states may impose regulations such as these on information services.<sup>5</sup> Even if, as the CLECs argue, the scope of such preemption were limited to public utility regulation, state commission decisions establishing to whom BellSouth

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<sup>3</sup> Memorandum Opinion and Order, *GTE Telephone Operating Cos , GTOC Tariff No 1, GTOC Transmittal No 1148*, 13 FCC Rcd 22466 (1998) ("*GTE Tariff Order*").

<sup>4</sup> Brief of Petitioner AT&T Corp , *AT&T Corp v Central Office Tel , Inc* , No. 97-679, 1998 WL 25498, at \*33 (U.S. filed Jan. 23, 1998) ("*AT&T Brief*") (emphasis added).

<sup>5</sup> As BellSouth was finalizing these comments, the Commission issued its declaratory ruling in the pulver com proceeding. The Commission's decision there strongly supports BellSouth's jurisdictional analysis, as well as BellSouth's analysis of the scope of the Commission's deregulation of information services. After reviewing that decision fully, BellSouth intends to file an ex parte discussing its relevance here.

must offer service, and on what rates, terms, and conditions, are quintessential examples of public utility regulation. As the Supreme Court concluded just a few weeks ago, regulatory requirements that a party must offer service to another party necessarily require regulators “to act as central planners, identifying the proper price, quantity, and other terms of dealing.”<sup>6</sup>

Despite the Commission’s clear holdings on these issues, BellSouth is currently reallocating resources to implement the systems changes necessary to comply with these state broadband regulations. These compliance costs and systems changes are supplanting BellSouth’s efforts to develop and deploy new and innovative broadband offerings to meet those of its competitors. The ultimate detrimental effect of having to comply with multiple and inconsistent state regulations of BellSouth’s interstate broadband services will be borne not only by BellSouth but also by consumers. It is thus crucial that the Commission resolve this Request expeditiously to remove uncertainty and take away this significant drag on broadband investment.

\* \* \* \* \*

These comments are organized as follows. Part I explains why expedited treatment of this Request is necessary to remove disabling uncertainty that impedes broadband deployment and to avoid continuing harm to BellSouth. Part II demonstrates that the Commission’s decision in the *Triennial Review Order* controls this matter; that the Commission’s determination there preempts contrary state commission judgments; and that CLEC policy arguments are collateral attacks on that decision.

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<sup>6</sup> *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872, 879 (2004).

Part III explains why, even if this were an open issue, it would be an issue within this Commission's exclusive jurisdiction and outside the state commission's authority. Part IV discusses why state regulation runs afoul of this Commission's determinations establishing that information services must remain unregulated. Part V explains why the CLECs' policy arguments are, in all events, incorrect. Finally, Parts VI and VII demonstrate that neither the Communications Assistance for Law Enforcement Act ("CALEA") nor the federal courts' jurisdiction is a barrier to the Commission issuing a declaratory ruling resolving this matter

#### **I. THE COMMISSION SHOULD RESOLVE THIS MATTER ON AN EXPEDITED BASIS**

The Commission should resolve this matter on an expedited basis in order to enforce Congress's express determination "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2)

Currently, BellSouth is attempting to implement the unique and conflicting mandates of various state commissions. In order to comply with these mandates, BellSouth is being forced to reallocate resources that were previously devoted to competing with other broadband providers. BellSouth's ability to compete in the broadband marketplace against the dominant provider, cable, is being seriously undermined by this reallocation.

Most troubling is that achieving compliance with these state broadband regulations is coming at the expense of BellSouth's timely development and offering of new broadband services to meet the competition. For example, BellSouth's release of a 3Mb ("3-meg") residential DSL service into the marketplace to compete with cable's

3-meg service offering has been substantially delayed due to the need to implement the systems changes necessary to comply with the state broadband regulations at issue in this proceeding. Moreover, the uncertainty of state regulation of these broadband services calls into serious question the propriety of additional investment in broadband infrastructure.

In addition to these unnecessary costs that are ultimately borne by the public in the form of higher prices and/or fewer competitive alternatives, there exist significant direct costs of compliance, including the design and implementation of interim and long-term solutions, manual processing costs, systems development, lost product development opportunities, disruption in product portfolio, customer service quality issues, and legal/regulatory defense.

These specific costs were discussed and quantified in a February 19, 2004 ex parte filed in this proceeding. *See* Ex Parte Letter from Glenn T. Reynolds, BellSouth, to Marlene H. Dortch, FCC, WC Docket No. 03-251 (Feb. 19, 2004). As that filing shows, state commissions are requiring that these expenditures be made just so a very small number of CLEC voice customers can obtain BellSouth DSL/FastAccess without having to purchase voice service. Accordingly, BellSouth is spending approximately \$1,500 per order to provide BellSouth's DSL services to a CLEC voice customer; that is \$1,500 per order being spent on regulatory compliance rather than additional investment in broadband infrastructure. Moreover, these regulatory compliance costs are, of course, not incurred by the dominant provider of such services, cable, or other competitive providers of broadband services.

At least as important, conflicting state determinations regarding the rates, terms, and conditions under which BellSouth must offer its DSL services to every CLEC voice customer entirely undermine this Commission's central policy objective of enhancing broadband investment and deployment. This Commission has declared that "[t]he widespread deployment of broadband infrastructure has become the central communications policy objective of the day."<sup>7</sup> In direct conflict with that "central" objective, the incentives for BellSouth to continue to invest in the broadband infrastructure necessary to create the networks of tomorrow diminish considerably when it must comply with multiple and inconsistent state determinations. Those determinations jeopardize BellSouth's capacity to maximize the return on its investments and hamper BellSouth's ability to compete effectively in the marketplace. If BellSouth were not permitted to take full advantage of its DSL investments, it would have little incentive to make such investments in the future. That, in turn, would entrench the position of the dominant broadband provider, cable.

If the Commission does not affirmatively preempt all state commission regulation of BellSouth's broadband Internet access service offerings, companies such as BellSouth that want to continue investing in such competitive service offerings will hear the message loud and clear: If you invest in a risky, but innovative, new service or technology that consumers ultimately determine has value, the value of your investment will nevertheless be eroded through misguided regulatory action.

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<sup>7</sup> Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd 3019, 3020-21, ¶ 1 (2002) ("*Wireline Broadband NPRM*") (footnote omitted).

On this point, the comments of Catena Networks deserve special attention. Catena, a manufacturer of telecommunications equipment that incorporates DSL capabilities, confirms the adverse impact on incumbent carriers' incentives to invest in advanced services equipment as a result of the "free rider" effect of these state rulings. Catena at 2. Catena confirms that "regulatory disincentives and growing uncertainty resulting from State commission imposition of DSL 'bundling' obligations have slowed, and in some cases stopped, ILEC investment in new technologies capable of providing advanced broadband services." *Id.* at 2-3. Catena correctly concludes that, if these state commission decisions are allowed to stand, CLECs will be able to offer the same bundle without having made any investment whatsoever. *See id.* at 6.

In order to provide all companies with the appropriate incentive to deploy broadband infrastructure and services, BellSouth urgently requests that the Commission grant its request for a declaratory ruling preempting these state decisions.

## **II. THE COMMISSION'S *TRIENNIAL REVIEW ORDER* PREEMPTS STATE DECISIONS THAT REQUIRE ILECS TO PROVIDE BROADBAND SERVICES TO CLEC UNE VOICE CUSTOMERS**

### **A. The *Triennial Review Order* Resolved the Same Issue Presented Here**

In the *Triennial Review* proceeding, the Commission faced the same legal issue that is presented here and that was before the state commissions in the cases that BellSouth has discussed: whether ILECs should be required to provide broadband services to CLEC UNE voice customers.

During the *Triennial Review* proceeding, CompTel asserted that BellSouth was "tying" its broadband services to its local voice products and that, "[a]s a result, a customer that wishes to obtain xDSL service from the ILEC while obtaining local voice

service from a competing carrier often is rejected by the ILEC.”<sup>8</sup> CompTel urged the Commission to establish a “‘low frequency’ portion of the loop” UNE to “end these anti-competitive tying arrangements” in order to “permit subscribers to obtain xDSL and local voice services from the providers they choose.”<sup>9</sup> As CompTel further stated, “[b]y declaring that the lower frequency portion of a line” was a UNE, “the Commission would ensure that new entrants continue to have access to . . . consumers” that use ILEC broadband services.<sup>10</sup>

The Commission “disagree[d]” with CompTel’s claims and held that, instead of coercing ILECs into acting as a broadband provider of last resort, the proper way to handle this issue was for a “narrowband service-only competitive LEC to take full advantage of an unbundled loop’s capabilities by *partnering with a second competitive LEC that will offer xDSL service*” *Triennial Review Order*, 18 FCC Rcd at 17141, ¶ 270 (emphasis added). Under the Commission’s decision, therefore, a CLEC that does not wish to invest in broadband capabilities should “partner[] with a second competitive LEC”; the Commission *rejected* the claim that it should force the ILEC into offering broadband services. *Id.*, see also *id.* at 17140-41, ¶ 269 (“In the event that the customer ceases purchasing voice service from the incumbent LEC, *either the new voice provider or the xDSL provider, or both, must purchase the full stand-alone loop to continue providing xDSL service*”) (emphasis added).

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<sup>8</sup> Comments of the Competitive Telecommunications Association, CC Docket Nos 01-338 *et al.*, at 43 (FCC filed Apr. 5, 2002)

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 45

In sum, the *Triennial Review Order* made very clear that the Commission's national broadband policy was that CLEC voice providers or a partnering CLEC broadband provider -- not an ILEC being forced to offer service against its will -- should provide broadband services to the CLEC voice customer. *See also id.* at 17135, ¶ 261 (proper policy should encourage CLECs to develop their own "bundled voice and xDSL service offering", rejecting line sharing because it would "discourage innovative arrangements between voice and data competitive LECs and greater product differentiation between the incumbent LECs' and the competitive LECs' offerings")

Having lost on this issue, some CLEC commenters that apparently prefer not to invest in their own broadband facilities or to rely upon market-based line-splitting deals now want to pretend as if this Commission judgment does not exist. CompTel itself, joined by AT&T, goes so far as to argue that state regulatory requirements that force BellSouth to provide broadband service to CLEC voice customers involve "precisely the type of *commercial arrangement* [sic] that the *Triennial Review Order* expressly held to be permitted" and that "nothing in the *Triennial Review Order* . . . remotely authorizes what BellSouth has done." AT&T/CompTel-ASCENT at 3 (emphasis added), *see* Cinergy at 11-12 (similarly contending that these kinds of mandates involve the kind of line-splitting arrangements the Commission intended to encourage); *see also* MCI at 2, Z-Tel at 15.

These assertions are impossible to square with the Commission's order or with CompTel's own arguments in the *Triennial Review* proceeding. Accordingly, other commenters undermine these fanciful claims. They acknowledge that the Commission has in fact resolved the same issue presented here, and done so in a way directly contrary

to the position of AT&T, MCI, and others. Thus, although Americatele opposes BellSouth's request for relief, it forthrightly concedes that, in the *Triennial Review Order*, the Commission decided "to permit ILECs to refuse to provide DSL services to CLEC voice customers." Americatele at 15; *see id.* at 4 (acknowledging that the Commission has "bar[red] the states from requiring ILECs to provide DSL service to CLEC customers"). Catena, an equipment maker whose sole interest in participating in this proceeding is in enhancing broadband deployment, similarly explains that the Commission has "already determined these issues" and that the state commission rulings that BellSouth has discussed are "inconsistent" with the *Triennial Review Order*. Catena at 6, 7, *see also* Verizon at 7-8.

As BellSouth noted at the outset, a federal court has likewise explained that the *Triennial Review Order* resolved this same question. In dismissing with prejudice a class-action complaint challenging the same BellSouth policy at issue here, the federal court concluded that "the FCC, in its *Triennial Review Order*, has already examined possible competitive benefits from requiring ILECs to provide their DSL service to CLEC customers, and it has determined not only that such a regulatory requirement would bring no benefit, but also that it would discourage investment and innovation and thus harm consumers." *Levine*, slip op. at 21. The court thus properly read the *Triennial Review Order* as "actively examin[ing] and affirmatively reject[ing] the claimed competitive benefits" of imposing a "regulatory duty" on BellSouth to offer broadband service to CLEC voice customers. *Id.* (first emphasis added).

Indeed, because it is so clear that the issue presented here is the same one that the Commission decided in the *Triennial Review Order*, commenters that seek to challenge

that ruling are reduced to little more than wordplay. In particular, several commenters argue that the state commission decisions are distinguishable from this Commission's determination simply because they did not explicitly deal with "unbundling." *See, e.g.*, Z-Tel at 15 ("The challenged state decisions actually do not require BellSouth to 'unbundle' anything."), FDN at 8.

The state commissions' choice of verbiage does not change the fact that the *Triennial Review Order* addressed the same substantive issue as these state commission orders – whether ILECs should be forced to provide DSL service to CLEC UNE voice customers. The Commission resolved that issue in BellSouth's favor. The states cannot avoid that determination simply by using different words in imposing the same substantive requirement this Commission has found to be contrary to federal policy.

Nor is there substance to a few parties' assertions that these state requirements raise a distinct issue because they allegedly require the CLEC to pay for an entire loop, not just the low-frequency portion. *See, e.g.*, AT&T/CompTel-ASCENT at 22, MCI at 18. The cost of the high-frequency portion of the loop played no role in this Commission's analysis. Nor could it have been a factor in that analysis, given the Commission's express finding that "most states" set the rate for access to that portion of the loop at "roughly zero." *Triennial Review Order*, 18 FCC Rcd at 17135, ¶ 260 & n 774.

In fact, contrary to these assertions, the issue for the Commission in the *Triennial Review Order* was whether what CompTel labeled "DSL tying" was an anticompetitive practice that the Commission should stop. The Commission not only rejected CompTel's argument on that point, but also determined that, in fact, it was *pro*-competitive to require

CLECs to compete by offering bundles of voice and data services either on their own or by “partnering with a second competitive LEC that will offer xDSL service,” *instead of* relying upon the ILEC to offer the broadband service to CLEC voice customers. *Id.* at 17141, ¶ 270. Under the Commission’s decision, it is the CLEC that leases the loop, not the ILEC, that is responsible for “tak[ing] full advantage of an unbundled loop’s capabilities.” *Id.* As BellSouth has explained, the Commission’s conclusion was thus that CLECs should develop their own “bundled voice and xDSL service offering,” and it expressly *rejected* requirements such as the one that CompTel proposed that would “discourage innovative arrangements between voice and data competitive LECs and greater product differentiation between the incumbent LECs’ and the competitive LECs’ offerings.” *Id.* at 17135, ¶ 261. Such requirements, the Commission explained, “would run counter to the statute’s express goal of encouraging competition and innovation in all telecommunications markets.” *Id.*

In sum, as the *Levine* court stated, the Commission determined that “requiring ILECs to provide their DSL service to CLEC customers” was *contrary* to the 1996 Act’s core goals because it would “discourage investment and innovation and thus harm consumers.” Slip op. at 21. That determination of federal law and national broadband policy directly controls here. That result does not change based on whether a particular requirement is labeled as “unbundling,” and it has nothing to do with whether CLECs are required to pay the cost of the high-frequency portion of the loop (which, as discussed above, was generally “roughly zero” at the time of the Commission’s order).

By the same token, the Commission’s explicit conclusion in the *Triennial Review Order* belies AT&T/CompTel’s and FDN’s assertion that the Commission has not “ruled

out the possibility that BellSouth's anticompetitive practices violate *federal law* ”

AT&T/CompTel-ASCENT at 23-24; *see* FDN at 10. Indeed, even before the *Triennial Review Order*, the Commission repeatedly concluded that BellSouth's policy was not merely consistent with federal law, but also affirmatively *nondiscriminatory*. For instance, in the *Georgia/Louisiana 271 Order*,<sup>11</sup> the Commission not only rejected claims that BellSouth's policy violated federal law, but also found that, “[f]urthermore,” in light of the ability to engage in line splitting, it “cannot agree” with the claims made by AT&T, CompTel, and others that the same policy at issue here is “discriminatory.”

17 FCC Rcd at 9100-01, ¶ 157 & n 562, *compare* Z-Tel at 18 (asserting incorrectly that the Commission found only that existing federal rules did not impose any obligation on BellSouth and failing to note the Commission's holding that the BellSouth policy is not discriminatory)

The Commission reiterated these conclusions in the *BellSouth Five-State 271 Order*,<sup>12</sup> where it again emphasized the ability of CLECs to engage in line splitting and again affirmatively rejected claims of discrimination. *See* 17 FCC Rcd at 17683, ¶ 164; *see also* *Florida/Tennessee 271 Order*,<sup>13</sup> 17 FCC Rcd at 25922, ¶ 178 (rejecting claim that the same policy was contrary to the public interest). Notably, all of these orders

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<sup>11</sup> Memorandum Opinion and Order, *Joint Application by BellSouth Corporation, et al for Provision of In-Region, InterLATA Services In Georgia and Louisiana*, 17 FCC Rcd 9018 (2002) (“*Georgia/Louisiana 271 Order*”)

<sup>12</sup> Memorandum Opinion and Order, *Joint Application by BellSouth Corporation, et al , for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina*, 17 FCC Rcd 17595 (2002) (“*BellSouth Five-State 271 Order*”)

<sup>13</sup> Memorandum Opinion and Order, *Application by BellSouth Corporation, et al , for Authorization To Provide In-Region, InterLATA Services in Florida and Tennessee*, 17 FCC Rcd 25828 (2002) (“*Florida/Tennessee 271 Order*”)

post-date the *Line Sharing Reconsideration Order*<sup>14</sup> that commenters cite in support of their incorrect assertion

The *Triennial Review Order* and these predecessor rulings also negate any contention that BellSouth's conduct violates 47 U.S.C. §§ 201 and 202. See Vonage at 15-20. Those statutory sections embody the Act's basic prohibition against unreasonable discrimination. See 47 U.S.C. § 202(a) (making it unlawful to engage in "unjust and unreasonable discrimination"), *AT&T Corp. v. City of Portland*, 216 F.3d 871, 879 (9th Cir. 2000) (section 201's "reasonable request" language likewise embodies the Act's "nondiscrimination" duty). But no party has explained how a practice that the Commission has found to be nondiscriminatory under section 251(c)(3) can somehow be discriminatory under sections 201 and 202. To the contrary, the Commission has long held that the nondiscrimination obligations of section 251(c)(3) are *broader* than those found in section 202. See *Local Competition Order*,<sup>15</sup> 11 FCC Rcd at 15612, ¶ 217. And, even if section 201's "reasonable request" language imposed a distinct duty, it is hardly "unreasonable" to decline to provide service over a facility that another party has leased and controls, or to refuse to offer service in a circumstance where the Commission has determined that the proper policy result is for competitors to invest in offering their own broadband facilities instead of mandating that the ILEC provide service.

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<sup>14</sup> Third Report and Order on Reconsideration in CC Docket No. 98-147, Fourth Report and Order on Reconsideration in CC Docket No. 96-98, Third Further Notice of Proposed Rulemaking in CC Docket No. 98-147, Sixth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 16 FCC Rcd 2101 (2001) ("*Line Sharing Reconsideration Order*").

<sup>15</sup> First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*") (subsequent history omitted).

Finally, there is no substance to Cinergy's assertion that BellSouth has violated the *Triennial Review Order*'s commingling requirements. As the Commission has explained, "commingling" in this context "mean[s] the connecting, attaching, or otherwise linking of a UNE, or a UNE combination, to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling . . . , or the combining of a UNE or UNE combination with one or more such wholesale services." 18 FCC Rcd at 17342, ¶ 579. But this issue does not involve "connecting," "attaching," or "combining" a UNE and a tariffed facility. CLECs are not, for instance, trying to link a UNE loop to a special access transport facility. Rather, they are leasing a facility as a UNE, and asking BellSouth to provide a tariffed service over the facility that the CLEC has leased. The commingling rules do not deal with that situation. Even if they did, the Commission's specific judgment in paragraph 270 would trump any more general determination in a separate part of the same order.

**B. The Commission's Order Preempts Contrary State Determinations**

Some commenters argue that the Commission's policy judgments in the *Triennial Review Order* are simply irrelevant to the state commissions' authority. As these parties see the matter, the Commission's decisions on such issues merely "place a floor under state regulation of the same subjects but not a ceiling above them." AT&T/CompTel-ASCENT at 27; see Louisiana PSC at 14-17, 19-20, MCI at 18-19. They thus claim that, under section 251(d)(3), "the states . . . are not bound by the specific limits placed on the Commission when adopting regulations pursuant to section 251(d)(2)," and can pile as

many regulatory obligations on broadband services as they please so long as it is not “impossible” to comply with both the state and federal rules. PACE at 17-19.

Again, these parties are seeking to relitigate issues that this Commission decided in the *Triennial Review Order*. There, the Commission made plain that “state action, whether taken in the course of a rulemaking or during the review of an interconnection agreement, is limited by the restraints imposed by subsections 251(d)(3)(B) and (C)” – that is, state actions “must be consistent with section 251 and must not ‘substantially prevent’ its implementation.” 18 FCC Red at 17100-01, ¶ 194.

Even more to the point, the Commission stated that, “[i]f a decision pursuant to state law were to require the unbundling of a network element for which the Commission has either found no impairment – and thus has found that unbundling that element would conflict with the limits in section 251(d)(2) – or otherwise declined to require unbundling on a national basis, we believe it unlikely that such [a] decision would fail to conflict with and ‘substantially prevent’ implementation of the federal regime, in violation of section 251(d)(3)(C).” *Id.* at 17101, ¶ 195. States that had enacted rules inconsistent with the Commission’s “new framework” would have to “amend their rules” and “alter their decisions” or the Commission would resolve the matter through a “declaratory ruling” proceedings such as this one. *Id.*

In sum, as the Commission recently told the D.C. Circuit, its decisions in the *Triennial Review Order* “reflect[] a ‘balance’ struck by the agency between the costs and

benefits of unbundling [an] element. *Any state rule that struck a different balance would conflict with federal law, thereby warranting preemption.*”<sup>16</sup>

That reasoning applies directly here. The Commission has determined that the low-frequency portion of the loop should not be a UNE because it concluded that the proper federal policy – the policy that comports with the requirements of the 1996 Act and the Commission’s national broadband-deployment objectives – is to encourage CLECs to engage in line splitting or to offer their own broadband service in order to “take full advantage of an unbundled loop’s capabilities.” *Triennial Review Order*, 18 FCC Red at 17141, ¶ 270. The Commission has thus struck the “balance” required by the statute, and, accordingly, “[a]ny state rule that struck a different balance would conflict with federal law, thereby warranting preemption.” Accordingly, as Americatelecon concedes, the *Triennial Review Order* “effectively set[s] a ceiling on the list of UNEs” and “bar[s] the states from requiring ILECs to provide DSL service to CLEC customers.” Americatelecon at 4, 5 (emphasis added).

It does not matter in this regard that the *Triennial Review Order* did not identify specific state requirements that had been preempted. See, e.g., MCI at 18. The *Triennial Review Order* established the legal standard by which such state determinations would be evaluated – state decisions that alter the balance created by the federal framework are preempted – and specifically invited parties such as BellSouth to initiate declaratory ruling proceedings such as this one so that the Commission could apply that rule to specific cases.

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<sup>16</sup> Brief for Respondents, *United States Telecom Ass’n v. FCC*, Nos. 00-1012 *et al.*, at 93 (D.C. Cir. filed Jan. 16, 2004) (emphasis added; citations omitted).

Moreover, the Commission's conclusions in the *Triennial Review Order* regarding the preemptive effect of section 251(d)(3) undermine CLECs' attempts to rely upon other savings clauses or preemption standards in the statute. *See, e.g.*, AT&T/CompTel-ASCENT at 27, PACE at 19-22; Z-Tel at 3. Whatever those other provisions' effect, they do not alter the fact that the Commission has concluded that, under section 251(d)(3), it may, and will, preempt state requirements that conflict with its federal-law policy determinations under the 1996 Act. *See generally AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 & n.6 (1999) ("[T]he question in these cases is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has.")

Nor does the district court's decision in *BellSouth Telecommunications, Inc. v. Cinergy Communications Co.*, No. 03-23-JMH, 2003 U.S. Dist. LEXIS 23976 (E.D. Ky. Dec. 29, 2003), affect this determination. The court's preemption analysis in that case does not even mention the *Triennial Review Order*, much less does it attempt to conform its interpretation of federal law to the Commission's statements there. Accordingly, in determining that the Kentucky PSC's order did not "substantially prevent implementation of federal statutory requirements," *id.* at \*20, the district court did not come to terms with the Commission's authoritative ruling that requiring unbundling arrangements that the Commission has rejected will almost invariably "substantially prevent implementation" of the statutory scheme, in violation of section 251(d)(3). In any event, BellSouth has appealed this decision to the Sixth Circuit and intends to request that the court of appeals hold briefing in the case pending the Commission's resolution of this matter, so that the

circuit court will have the benefit of this Commission's expert understanding of the law in reviewing this trial court decision <sup>17</sup>

**C. Because the *Triennial Review Order* Establishes the Relevant Federal Policy, Commenters Policy Arguments Are Irrelevant.**

Finally, some commenters spend a great deal of time arguing that the policy analysis in the *Triennial Review Order* (and in the BellSouth section 271 orders) is incorrect. They claim that BellSouth's policy does impair competition in local voice markets, that the policy has anticompetitive effects, and that the Commission's resolution of this issue will not in fact spur broadband investment and innovation. *See, e.g.*, AT&T/CompTel-ASCENT at 5-13, FDN at 3-6; MCI at 3-12; Z-Tel at 2-14. These commenters claim that the state commissions have gotten this issue right, and that this Commission's contrary policy is misguided.

Such arguments are beside the point. As discussed above, the Commission has already determined that the approach that is consistent with the 1996 Act and that furthers national broadband policy is *for CLECs*, either by themselves or through line-sharing arrangements, to "take full advantage of an unbundled loop's capabilities." *Triennial Review Order*, 18 FCC Rcd at 17141, ¶ 270. In short, the Commission's policy judgment was that CLECs should obtain an entire loop, not just the low-frequency portion, and provide all the services that they could over that facility, including broadband services, in order to defray its costs.

If commenters disagreed with that judgment as a matter of law or policy, their recourse was to seek review of the Commission's judgment in paragraph 270 of the

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<sup>17</sup> As BellSouth explains below, *see infra* Part VII, contrary to Cinergy's arguments, the Kentucky decision does not prevent this Commission from exercising its statutory right to declare what federal law is in this area.

*Triennial Review Order* in the D.C. Circuit or to request reconsideration by the Commission. What commenters may not do is collaterally attack that Commission order by asking the Commission to reevaluate these issues now from first principles. Rather, the Commission's task in this proceeding is to apply its existing legal and policy determinations to remove uncertainty by declaring the effect of its rulings on contrary state determinations. *See* 47 C.F.R. § 1.2. As the Commission has stated in a prior declaratory ruling proceeding, "indirect challenges" to its prior determinations are "impermissible collateral attacks" and are "properly denied."<sup>18</sup>

Even if this were an open issue, CLECs' policy arguments are no more persuasive today than they were when they were rejected in the *Triennial Review Order*. As BellSouth demonstrates below in Part V, the Commission's policy correctly encourages CLECs and ILECs to invest in broadband facilities, in accordance with one of the Commission's (and Congress's) core policies.

### **III. THIS ISSUE INVOLVES JURISDICTIONALLY INTERSTATE SERVICES UNDER THE EXCLUSIVE JURISDICTION OF THIS COMMISSION**

Even if the substantive issue here - whether ILECs must offer interstate broadband services on CLEC lines - were an open one before this Commission, the state commissions would still lack authority to decide it. This Commission has exclusive authority over jurisdictionally interstate communications, including those offered under federal tariff. The Commission has said so itself on multiple occasions. *See* BellSouth Request at 26 & n.26. The federal courts have likewise confirmed this rule. *See id.* at

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<sup>18</sup> Memorandum Opinion and Order, *Motions for Declaratory Rulings Regarding Commission Rules and Policies for Frequency Coordination*, 14 FCC Red 12752, 12757-58, ¶ 11 (1999).